84-140

No. ______

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

THOMAS WENDELL HOLLIDAY,

Petitioner-Appellee

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent-Appellant

On Appeal From The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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8588

QUESTIONS PRESENTED FOR REVIEW

1. WHERE THE SECURITIES AND EXCHANGE COMMISSION ("SEC") BROUGHT AN ACTION IN THE TRIAL COURT AGAINST THE PETITIONER AND THREE OTHER DEFENDANTS (JOINING ALL IN ONE ACTION PURSUANT TO RULE 20 OF THE F.R. CIV. P.) AND SOUGHT AGAINST EACH DEFENDANT A PROHIBITORY INJUNCTION, WHICH RELIEF WAS DENIED AS TO THIS PETITIONER BY WAY OF DISMISSAL OF THE ACTION AGAINST HIM BUT GRANTED AS TO THE ONLY REMAINING CO-DEFENDANT, DOES THE FILING OF AN APPEAL BY THE UNSUCCESSFUL CO-DEFENDANT ENLARGE THE TIME WITHIN WHICH THE SEC CAN FILE ITS APPEAL AS TO THE DISMISSAL OF ITS ACTION AGAINST PETITIONER?

2. WHERE THE SOLE RELIEF SOUGHT BY THE SEC AGAINST PETITIONER WAS AN INJUNCTION AND WHERE THAT RELIEF WAS DENIED BY WAY OF DISMISSAL OF THE ACTION, DID THE COURT OF APPEALS PROPERLY DENY THE PETITIONER THE RIGHT TO ATTACK VARIOUS LEGAL AND FACTUAL FINDINGS AND/OR REASONING OF THE TRIAL COURT WHERE SUCH ATTACKS WERE FOR THE PURPOSE OF SUPPORTING THAT COURT'S DISMISSAL OF SEC'S CAUSE OF ACTION?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner, Thomas Wendell Holliday ("Holliday"), was a defendant in a civil enforcement action brought by the Securities and Exchange Commission ("SEC") in 1979 against N. Rountree Youmans, John Vorder Bruegge, Richard A. Chepul ("Chepul") and Holliday in the United States District Court for the Eastern District of Tennessee. Chepul and the SEC filed separate notices of appeal from the district court decision. The SEC's appeal to the Sixth Circuit Court of Appeals involved the district court decision with respect to Holliday. The petition for writ of certiorari to this Court is from the Sixth Circuit Court of Appeals decision in the SEC's appeal. Thus, the relevant parties to this proceeding are the SEC and Holliday.

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The pertinent opinions below are SEC v. Youmans, et al., 543 F.Supp. 1292 (ED Tenn. 1982), and SEC v. Holliday, 729 F.2d 413 (6th Cir. 1984), both of which are set out in the appendix filed herewith at pages A-1 and A-45 [1] respectively.

JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered on March 8, 1984 (A-53). The Order denying Holliday's Petition for Rehearing *en banc* was entered April 27, 1984 (A-55). The statutory provision providing for jurisdiction of this Court to review the Sixth Circuit's judgment is 28 USC §1254.

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1 Hereafter, references to the Appendix will be referred to by the letter "A" followed by the page number where a particular document may be found.

PROCEDURAL PROVISIONS AND RULING CASE LAW INVOLVED

This petition involves an interpretation of the term "any other party", as found in Rule 4(a)(3) of the Federal Rules of Appellate Procedure. Furthermore, the argument will address the Court of Appeals' presumption that Rule 4(a) of the Federal Rules of Appellate Procedure by implication creates a right of a cross-appeal to a cross-appeal. Finally, the petition will explore the applicability of the case of Massachusetts Mutual Life Insurance Co. v. Benno P. Ludwig, Etc., 426 US 479, 48 L.Ed.2d 784, 96 S.Ct. 2158 (1976), to the Court of Appeals' ruling limiting the breadth of petitioner's argument below.

STATEMENT OF THE CASE

This petition deals with a portion of a case that was originally filed in the United States District Court for the Eastern District

of Tennessee, Southern Division by the SEC in 1979. Therein it sued four former directors and/or officers of the then bankrupt Hamilton Bancshares, Inc. The SEC, in that action, joined the four defendants for convenience pursuant to Rule 20 of the Federal Rules of Civil Procedure. The one relief sought as to each defendant was injunctive. The SEC prayed for an injunction restraining and enjoining each defendant from committing future violations of the anti-fraud provisions of the Securities Act of 1933, 15 USC §§ 77 _et seq_. ("Securities Act"), and the anti-fraud, reporting and proxy provisions of the Securities Exchange Act of 1934, 15 USC §§ 78a _et seq_. ("Exchange Act"). Federal jurisdiction in the trial court was invoked pursuant to 15 USC § 77b and 15 USC § 78u, b,e. Prior to the trial of this cause a consent decree was entered into vis-a-vis the SEC and

defendants, N. Rountree Youmans and John Vorder Bruegge. Subsequent thereto, the case as to Holliday and the case as to Chepul were tried at the same time before the Honorable Frank W. Wilson, District Judge, sitting without intervention of a jury. That Court's Findings of Fact and Conclusions of Law (A-1) and the attendant Judgment were entered on July 23, 1982. The judgment granted injunctive relief against Chepul and dismissed the action brought by the SEC as to Holliday. The SEC then moved to modify the final judgment (on August 2, 1982) as between itself and Chepul (this being done subsequent to a motion by Chepul to alter and amend the court's judgment). Also, on the same day, the SEC moved to vacate the final judgment as to defendant Holliday. Subsequent to these motions, District Judge Frank Wilson

became disabled and ultimately died. District Judge Vining thereafter addressed the outstanding motions and denied the SEC's motion to vacate on November 22, 1982. As part of that particular order, Judge Vining also denied Chepul's motion to alter and amend and granted SEC's motion to modify the final judgment as to Chepul.

Chepul, on January 17, 1983 filed a timely notice of appeal from the above amended final judgment of Judge Vining (A-31). Chepul's appeal was noted in the United States Court of Appeals for the Sixth Circuit and assigned No. 83-5038. Subsequent to Chepul's appeal, the SEC filed a notice of appeal which was received and docketed by the United States District Court for the Eastern District of Tennessee, Southern Division (A-41) on January 24, 1983 (more than 60 days from the filing of the amended final judgment). This appeal

was assigned No. 83-5054. Holliday moved to dismiss the appeal as to himself on the 17th day of February, 1983. That motion was subsequently amended on May 17, 1983. During the intervening period between February 17, 1983 and May 17, 1983, the SEC moved the Sixth Circuit to consolidate Appeals Nos. 83-5038 (Chepul as appellant) and 83-5054 (SEC as appellant) for briefing schedules, etc. This motion was denied. Thereafter, Holliday's motion to dismiss for untimeliness of appeal was denied (A-43). Briefing schedules then moved apace as to both appeals until such time as the SEC and Chepul filed a joint motion to stay the appeal in No. 83-5038 for the purpose of compromising the controversy between the two parties. That compromise was ultimately achieved in August of 1983 and Chepul's appeal (No. 83-5038) was dismissed.

The SEC, in appeal No. 83-5054, filed their brief as to Holliday on April 18, 1983. Holliday responded by reply brief dated June 18, 1983. This brief contained many factual and legal arguments which, although they were attacks on the district court's reasoning and application of law, were for the purpose of upholding the lower court's dismissal of SEC's action against Holliday. The SEC thereupon filed a rejoinder to the arguments contained in Holliday's brief (on August 20, 1983) wherein the SEC _inter alia_ argued that Holliday (not having cross-appealed the SEC's cross-appeal) did not have the right to make arguments attacking the district court's finding that he acted with scienter, etc.

A judgment was entered by the Sixth Circuit Court of Appeals on March 8, 1984 (A-53), reversing the district court's

dismissal of the SEC's action against Holliday. The circuit court remanded the case with instructions to enter an appropriate injunction against Holliday. On March 22, 1984, Holliday filed a petition for re hearing _en banc_ which was denied by circuit court order dated April 17, 1984 (A-55). The Sixth Circuit's judgment reversing and remanding this case was then issued as mandate on May 7, 1984. A final judgment for permanent injunction against Holliday was entered in the district court on May 21, 1984.

ARGUMENT

1. WHERE THE SECURITIES AND EXCHANGE COMMISSION ("SEC") BROUGHT AN ACTION IN THE TRIAL COURT AGAINST THE PETITIONER AND THREE OTHER DEFENDANTS (JOINING ALL IN ONE ACTION PURSUANT TO RULE 20 OF THE F.R. CIV. P.) AND SOUGHT AGAINST EACH DEFENDANT A PROHIBITORY INJUNCTION, WHICH RELIEF WAS DENIED AS TO THIS PETITIONER BY WAY OF DISMISSAL OF THE ACTION AGAINST HIM BUT GRANTED AS TO THE ONLY REMAINING CO-DEFENDANT, DOES THE FILING OF AN APPEAL BY THE UNSUCCESSFUL CO-DEFENDANT ENLARGE THE TIME WITHIN WHICH THE SEC CAN FILE ITS APPEAL AS TO THE DISMISSAL OF ITS ACTION AGAINST PETITIONER?

The complaint which the SEC filed in the United States District Court for the Eastern District of Tennessee, Southern Division, asserted that it was entitled to relief (injunction) "severally" against the defendants, Chepul, Youmans, Vorder Bruegge and Holliday. This is obviously a Rule 20 (F. R. Civ. P.) permissive joinder of parties. It has been stated that under Rule 20 a joinder

such as we have here does not affect the substantive rights of the various parties and they remain the same as if separate actions had been brought against each of the parties. See, Landsburgh & Bro. v. Clark, 127 F.2d 331 (DC Cir. 1942). The Statement of the Case above demonstrates that Chepul timely appealed the Amended Final Judgment (A-37) which permanently enjoined him of future violations of certain statutes pursuant to the SEC's request in its complaint. The record clearly demonstrates that the final judgment which dismissed the SEC's action against Holliday was entered by the district court on November 22, 1982. The record further demonstrates that the SEC's notice of appeal (whatever they choose to call it - be it direct appeal or cross-appeal) was filed with the United States District Court on the 24th day of January, 1983. Pure addition demonstrates that said notice was filed

sixty-three (63) days after final judgment as to Holliday.

Rule 4(a)(1) of the Fed. R. App. P. states:

> "In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; <u>but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry</u>. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted." (Emphasis added).

The SEC insists that this flaw is alleviated by Rule 4(a)(3) of the Fed. R. App. P., which states:

> "If a timely notice of appeal is filed by a <u>party</u>, <u>any other party</u> may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time prescribed by this Rule 4(a), whichever period last expires." (Emphasis added).

It should be remembered petitioner Holliday filed a timely motion to dismiss with the circuit court below which was addressed by a panel from the court prior to the oral hearing. The panel's decision is found at A-43 and 44. Therein, without discussing the question of whether Holliday was truly a party for the purposes of Fed. R. App. P. 4(a)(3), the panel held that the SEC's notice of appeal, filed sixty-three days after the final judgment, was timely, citing the before mentioned rule and the case of Kurdziel v. Pittsburgh Tube Company, 416 F.2d 882 (6th Cir. 1969). The use of Kurdziel as support of the panel's ruling is interesting but somewhat inconsistent. One finds therein a discussion of Rule 4(a)(3) and the court's interpretation of same. The Kurdziel panel states:

> "We believe that the purpose of the rule change was clearly to give

> subsidiary parties, such as third-party defendant Travelers, an opportunity to know whether or not an appeal was going to be taken in the principal case before they were required to make their judgment as to whether or not to appeal. We see much logic to the rule change and no occasion to construe its meaning contrary to the purpose stated by the committee and expressed in the language of the amendment." (Page 885 - emphasis added).

Apparently, the panel that reviewed Holliday's motion to dismiss assumed Holliday to be a subsidiary party to the judgment against Chepul as opposed to reviewing the pleadings and final judgment which would have demonstrated otherwise.

Thus, the court below is insisting that Thomas Wendell Holliday "is a party" for the purpose of the application of 4(a)(3). In point of fact, Holliday was not a party to the portion of the Amended Final Judgment which created an injunction against Chepul. Nor, in point of fact, was Chepul a "party" to

that portion of the order which dismissed the SEC's action against Holliday. The reason being that neither was "aggrieved" of the relevant portions of the judgment dealing with the other. That portion of the judgment which the SEC sought to say was covered by their "cross-appeal" was a denial of their motion to vacate the dismissal of Thomas Wendell Holliday as a defendant. Professor Moore has aptly observed:

> "The same is true when the plaintiff prevails against one defendant and his claim against another is dismissed, and the unsuccessful defendant appeals. If the appellee wishes to upset the dismissal he must file a timely notice of appeal. Otherwise is is res judicata. Thus the rights of a party under a judgment cannot be disturbed except on appeal by a party aggrieved." 9 Moore's Federal Practice § 204.11[4] at 4-54 (2d Ed. 1968) (Emphasis added).

Furthermore, even the Sixth Circuit has recognized the above enunciated principle when it held, as a general rule, "that only a party

who is aggrieved by an order can appeal from it." Fuller v. Branch Co. Road Comm'n., 520 F.2d 307 (6th Cir. 1975).

It is submitted, therefore, that the SEC was obligated (as an aggrieved party) to file its appeal as to the dismissal of Wendell Holliday within 60 days of the Amended Final Order. It is further submitted that Holliday was not a subsidiary party to the prohibitory injunction enunciated against Chepul in the Amended Final Order and, therefore, the SEC was not afforded an additional 14 days from Chepul's appeal within which to "cross-appeal" against Holliday.

2. WHERE THE SOLE RELIEF SOUGHT BY THE SEC AGAINST PETITIONER WAS AN INJUNCTION AND WHERE THAT RELIEF WAS DENIED BY WAY OF DISMISSAL OF THE ACTION, DID THE COURT OF APPEALS PROPERLY DENY THE PETITIONER THE RIGHT TO ATTACK VARIOUS LEGAL AND FACTUAL FINDINGS AND/OR REASONING OF THE TRIAL COURT WHERE SUCH ATTACKS WERE FOR THE PURPOSE OF

SUPPORTING THAT COURT'S DISMISSAL OF SEC'S CAUSE OF ACTION?

Holliday, in his reply brief to the SEC, attempted to argue from the record that:

> The record does not support the district court's finding that Holliday recklessly violated the Federal Securities laws and the court was clearly eroneous in so holding.

and

> The district court's legal conclusion that recklessness without a 'motive for disception' was sufficient to meet the scienter requirement in an injunctive action under 10(b) and 14(a) was eroneous.

These were the same positions taken in appellant Chepul's brief filed in 83-5038. Despite that fact, after the SEC compromised that appeal by way of Chepul's dismissal of the same, it took the position, in a supplemental brief to Holliday's reply brief, that:

> "Since Mr. Holliday did not cross-appeal, this court does not have jurisdiction to entertain his arguments seeking to overturn the district court's finding that he acted with scienter . . .".

The Court of Appeals below embraced this argument with enthusiasm when it stated:

> Second, Holliday argues that the district court improperly concluded that he violated the Securities Laws. He has not, however, cross-appealed on this point. Since filing a notice of cross-appeal is jurisdictional where an appellee wishes to attack part of a final judgment in order to enlarge his rights or to reduce those of his adversary . . .". (A-45)

This petitioner has difficulty with the circuit court's characterization of Holliday's argument as an attempt to increase his right under the judgment or decrease the SEC's right. If that theory were applied to the judgment against Chepul, it would indeed be correct. It is difficult, however, to perceive how a defendant could legally enlarge upon a judgment which dismissed the action against him. (See, however, Alaska Industrial Board v. Chugach Electric Ass'n., 356 U.S. 320, 324-325, 78 S.Ct. 735, 2 L.Ed.2d795 (1957)). Concomitantly, it is

difficult to perceive how a defendant might reduce the rights of the plaintiff with regard to a final judgment of dismissal against the defendant.

The circuit court's suggestion that Holliday should have filed a cross-appeal is equally puzzling. Not a single explicit reference can be found in Rule 4 of the Fed. R. App. P. to any right one would have to cross-appeal a Rule 4(a)(3) cross-appeal.

The inequities of the factual situation presented in this petition are readily apparent. Had not the SEC compromised the appeal vis-a-vis itself and Chepul (the appeal whereon it based its right to exceed the 60 day filing time of its appeal against Holliday), all the arguments Holliday attempted to present in his reply brief would have been before the appellate court. However, there is another legal principle which this petitioner feels would entitle

him to have been heard on the matters contained in his brief. That will be discussed hereafter.

Holliday, in his brief, attempted to rely solely upon the trial record and certain case law to suggest to the circuit court that the reasoning of the lower court was flawed and that as such the judgment against him should, in any event, be upheld. The circuit court cited the case of Ford Motor Credit Co. v. Aetna Casualty & Surety Co., 717 F.2d 959 (6th Cir. 1983), in support of its ruling that Holliday could not argue the issues (as set out above) without first having filed a (second) cross-appeal. It is respectfully suggested herein that the circuit court's reliance upon the Ford Motor Credit Co. case is inappropriate as it relates to the factual situation presented by this petition. The petitioner would further suggest that he was entitled under the "inveterate and certain" rule

(Morley Co. v. Maryland Cas. Co., 300 U.S. 185, 191, 81 L. Ed. 593, 57 S.Ct. 505 (1937)) to urge in support of the district court's dismissal of the SEC's complaint against him any matter that may be found in the record even though his argument attacks the reasoning of the trial court or brings up legal matters overlooked or ignored by it. This petitioner is convinced that the teachings of this Court in United States v. New York Telephone Co., 434 U.S. 159, 98 S.Ct. 364, 54 L.Ed.2d 376 (1977) are applicable to the legal posture of the petitioner with regard to the circuit court's ruling. The teachings are best characterized through Justice White's own words where he oberved:

> "Although neither this issue . . . is encompassed within the question in the petition for certiorari and the Company has not filed a cross petition, we have discretion to consider them because the prevailing party may defend a judgment on any ground which the law and the

record permit that would not expand the relief it has been granted. . . . The only relief sought by the Company is that granted by the Court of Appeals; the reversal of the district court's order . . .". 434 U.S. 166, n 8 (Citations omitted).

CONCLUSION

For all of the foregoing reasons, petitioner urges that he be granted a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing PETITION FOR WRIT OF CERTIORARI were caused to be served by depositing both copies at the United States Post Office, express mail (next day service), paying the proper fee therefor, the same having been addressed to the following:

Ira Paull, Esq.
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James W. Gentry, Jr.

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A P P E N D I X

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

SECURITIES AND EXCHANGE COMMISSION,	§	
	§	
Plaintiff	§	
v.	§	
	§	CIV-1-79-216
N. ROUNTREE YOUMANS	§	
JOHN VORDER BRUEGGE	§	(Filed July 13, 1982)
THOMAS WENDELL HOLLIDAY	§	
RICHARD A. CHEPUL,	§	
	§	
Defendants	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is an action by the Securities and Exchange Commission (SEC) against certain former directors and officers of Hamilton Bancshares, Inc. (HBI) in which the SEC seeks a permanent injunction restraining and enjoining the defendants from committing future violations of the Securities Act of 1933, 15 USC §§77e *et seq*. (Securities Act) or of the Securities Exchange Act of 1934, 15 USC §§78a *et seq*. (Exchange Act). Jurisdiction is invoked pursuant to 15 USC §§77t(b)

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

and 15 USC §78u(d) and (e) and is not in dispute. Prior to trial of the case a consent decree was entered as to the defendants Youmans and Vorder Bruegge. The case was tried before the Court sitting without a jury as to the defendants Holliday and Chepul. The case is presently before the Court upon the record made at the trial of the lawsuit. The Court enters the following findings of fact and conclusions of law on the basis of the full record made in the course of the trial of the lawsuit.

Findings of Fact

(1) On and prior to February 16, 1976, Hamilton Bancshares, Inc. (HBI) was a Tennessee bank holding company having its principal offices in Chattanooga, Tennessee. During its existence HBI was registered with the SEC pursuant to Section 12g of the Securities and Exchange Act of 1934. Its common stock was publicly traded over-the-counter and quoted on the National

Association of Securities Dealers Automated Quotations System ("NASDAQS"). In addition, HBI common stock was sold to employees of HBI and its affiliated companies during 1974 and 1975.

(2) In its capacity as a holding company, HBI owned all or substantially all of the capital stock in 17 banking corporations, including the Hamilton National Bank (HNB), and eight bank servicing corporations and other financial institutions, including the Hamilton Mortgage Corporation (HMC). HNB was a national bank with principal offices in Chattanooga, Tennessee. HMC was a wholly owned non-banking subsidiary of HBI engaged in the mortgage loan business in the Atlanta, Georgia area.

(3) Although the origins of Hamilton Bancshares, Inc. and Hamilton National Bank, as well as other subsidiary or affiliated corporations, relate back a number of years, the issues in this lawsuit are confined to the

period between 1972 and 1976, and, in particular, to the relationship and activities of Hamilton Bancshares, Inc., Hamilton National Bank and Hamilton Mortgage Corporation during that period.

(4) During the period from 1972 to 1975 the defendant, Thomas Wendell Holliday (Holliday), was Executive Vice President of HBI and served as a director and a member of the Executive Committee of that corporation. In March of 1975 Holliday became President of HBI and continued in that capacity until the initiation of the bankruptcy proceedings by HBI in 1976. During the period from 1972 to the bankruptcy of HBI in February of 1976, Holliday was charged with primary responsibility for drafting and filing HBI's reports with the SEC, including annual (form 10K), quarterly (form 10Q) and monthly (form 8K) reports and proxy soliciting materials. Since the termination of his relationship with

HBI following its bankruptcy in 1976, Holliday has become associated with an entity known as C & C Capital Corporation, with offices located in Knoxville, Tennessee. In this capacity Holliday is responsible for advising banks and financial institutions on management and investment matters. It does not appear that since the termination of his employment with HBI in 1976 he has engaged in an activity that involved the making or filing of reports pursuant to the Securities Act of 1933 or the Securities and Exchange Act of 1934.

(5) During the period from 1972 until 1976 Richard A. Chepul (Chepul) was Vice President and Secretary-Treasurer of HBI. In this capacity he served as a chief financial officer of HBI. His immediate superviser was Holliday. In his capacity as chief financial officer of HBI, Chepul was assigned the responsibility by Holliday for drafting and filing HBI's reports

with the SEC after such reports were first reviewed by Holliday. Although not a director of HBI, as the Secretary-Treasurer of HBI, Chepul was present at most of the Board of Directors meetings and Executive Committee meetings of HBI. During the period from 1972 to 1976 Chepul also served as a director on the Board of HMC. Since leaving HBI following its bankruptcy in 1976, Chepul has assumed the position of Vice President and Comptroller of United Carolina Bancshares, Inc., a bank holding company whose stock is publicly traded. In this capacity Chepul is responsible for filing all reports which are required to be filed with the SEC. It appears that at the time of the trial (1981) he was engaged in duties and activities substantially the same as those which he performed with HBI.

(6) On February 16, 1976, the United States Comptroller of Currency declared HNB to be insolvent and placed it in receivership. At the time HNB was placed in receivership it had assets of some $417,000,000 and its failure was the third largest bank failure in the history of the Nation. It was by far the largest subsidiary of HBI and its failure resulted in HBI filing for bankruptcy upon February 20, 1976. The issues in this lawsuit relate to the circumstances giving rise to the bankruptcy of HBI, the knowledge and participation of the defendants Holliday and Chepul in those circumstances, and the disclosures or lack of disclosures made in SEC reports with regard to those circumstances.

(7) One of the principal areas of alleged misrepresentation and nondisclosure which the defendants are charged with by the SEC relates to the making and processing of mortgage loans originated by HMC and participated in by HNB.

In regard to these matters the evidence appears to preponderate in favor of a finding of the following facts. In November of 1972 HBI formed HMC, a wholly owned subsidiary, in order to enter into the mortgage loan business in the Atlanta, Georgia area, an area then believed to be particularly promising for the making of real estate loans. As financial officers of HBI, one of the principal responsibilities of both Holliday and Chepul was the supervision of the funding of the operations of HMC. During the period from 1972 to 1976 HBI funded the operations of HMC by three principal methods. One method was the sale of commercial paper to outside financial institutions. A second method was borrowing from outside banks. The third method was the sale of participations in HMC loans, such loan participations having been sold primarily to HBI's principal subsidiary bank, HNB.

(8) Prior to the formation of HMC in 1972, and for a few months after its formation, the decision by HNB to purchase participations in loans originating with other financial institutions was subject to a creditworthiness review of the underlying loan. By the latter part of 1973 the established procedures for reviewing loans originated by HMC and submitted for purchase by HNB had been largely abandoned and such loans were being purchased by the Bank with little regard for the creditworthiness of the original borrower or the adequacy of the collateral.

(9) Other irregularities in the purchase by HNB of loan participations from HMC developed, including the purchase of individual loans in excess of loan limits, the purchase of loans without adequate documentation, and the practice of permitting HMC to make regular and large overdrafts on its account at HNB (See Ex. #34).

(10) Both Holliday and Chepul were fully aware of each of the irregularities recited in paragraphs (8) and (9) above. Notwithstanding discussions in October of 1973 with bank examiners with regard to these irregularities and with regard to violations of federal banking laws and regulations, both Holliday and Chepul made no disclosure of these matters in any report to the SEC, nor did they assert meaningful efforts to secure a discontinuance of the practices.

(11) By the end of 1973, and within approximately one year from its organization, HMC had committed to loans in excess of $230,000,000. Many irregularities occurred in the making of these loans. It appears that many loans for the acquisition and development of real estate were made with the borrower having no equity in the development and without proper appraisals. In 1974 the Atlanta real estate

market became depressed as a result of a nationwide recession in that year. As a combined result of the recession and the aggressive and irregular loan practices of HMC, more than $27,000,000 of HMC's loans were in past due status by September of 1974.

(12) In purchasing participations in loans originated by HMC, HNB purchased 99.9% of the face amount of the loan, leaving HMC sharing in the loan only to the extent of one-tenth of one per cent. By the end of 1974 over 40% of HNB's loan portfolio was invested in loan participations originated by HMC. During this period of time, interest payments on some $15,000,000 in loans participated to HNB became delinquent. HMC made these interest payments to HNB without collecting from the original borrower and the Bank then inaccurately recorded the loans as being current when in fact they were delinquent.

(13) Prior to July of 1974 Moody's Commercial

Paper Service, a national commercial paper rating service, had rated HBI's commercial paper as P-2, signifying that it was of medium high quality. As a result of the examination of various aspects of HBI's financial operations, Moody's advised HBI on July 1, 1974 that it would no longer rate HBI's commercial paper. The effect of this was to eliminate a national market for sales of such paper and to very substantially impair HBI's ability to fund HMC's operations. It also resulted in HNB increasing its purchase of HMC's loans. These matters were not disclosed in HBI's reports to the SEC.

(14) In September of 1974 the Comptroller of the Currency undertook one of its annual audits of HNB. The report as finally written was highly ciritcal of HNB (Ex. #82). It listed approximately $54,000,00 in classified loans, over 80% of which were loan participations

originated by HMC. The report was critical of the speculative nature of the HMC loans participated into the Bank, of the lack of proper documentation of the loans, of the poor management of the Bank, of domination of the Bank by HBI and of the reworking of loans to cover delinquencies in interest. Although it appears that most if not all of these conditions were either known or should have been known to HBI officials, including the defendants Holliday and Chepul, from sources other than the examiner's report, the conditions were not reported in any of the SEC filings made by those officials. The reason given for not making the disclosures was that the Comptroller's report was classified as "Confidential", thereby prohibiting disclosure of the conditions described in the report. As hereinafter noted, in December of 1974 disclosure of the information in the Comptroller's report was made to the New York line banks with which

HBI had established a line of credit.

(15) As a result of the criticism contained in the Comptroller's September 30, 1974 report (Ex. #82), on December 18, 1974 HNB entered into a written agreement with the Comptroller that it would purchase no further loan participations from HMC without express approval of the Comptroller (Ex. # 74). However, on the following day, December 19, 1974, HNB purchased an additional $2,500,000 in HMC participations without obtaining approval of the Comptroller, giving as an explanation for its actions that the additional loans were being processed at the time of the December 18, 1974 agreement.

(16) HBI filed an 8-K for the month of December 1974 increasing its provisions for loan losses by $4,500,000 to a total of $15,000,000. The reason stated in the report for the increase in the reserve was as follows:

> "It is management's practice to conduct a continuous credit review of the loan portfolios of all Bancshares' subsidiaries, banking and nonbanking. A determination of the adequacy of the reserve for possible loan losses is based on this review and in light of the past loss experience factors, of current economic conditions, of changes in the character of the loan portofolio and other pertinent indicators.
>
> "These supplemental provisions for loan losses were provided in view of adverse economic conditions encountered in 1974 and continued adverse economic circumstances faced by the two subsidiary borrowers."

In light of the circumstances at the time, this statement appears to have been misleading. The actual facts showed and the defendants knew, that management made no "continuous credit review". In fact, HNB did not even make the review of the creditworthiness of its borrowers as required by federal banking laws. Moreover, it appears that the loan loss reserve was actually reviewed at the insistance of the Comptroller of the Currency.

(17) In 1973 and 1974 a principal source of credit available to HBI was through lines of credit obtained from money center banks in New York and Chicago. As early as August of 1974 Holliday and Chepul were advised by the Chicago bank, Continental Bank of Illinois, that it was dissatisfied with HBI's financial operations and was curtailing its line of credit. Subsequently in March of 1975 Continental withdrew all credit to HBI.

(18) In December of 1974 the New York line banks, upon learing of the criticisms made in the Comptroller's September 30, 1974 report, froze their lines of credit to HBI. As a result of this action, HBI granted the New York banks significant controls over the operations of HBI, including control over the sale or transfer of assets, and control over loans made by HMC. In March of 1975 the New York banks negotiated a "Revolving Credit Agreement" with HBI. This

agreement provided for a $20,000,000 line of credit, but required that $15,000,000 of this line be used to pay existing creditors of HBI. In addition, it placed in the New York banks extensive controls over the operations of HBI.

(20) In the March 1975 8-K report filed with the SEC, a copy of the Revolving Credit Agreement was attached, but the problems encountered with the Chicago and New York line banks were not otherwise adequately disclosed.

(21) In September of 1975 Holliday prepared an analysis of projected losses on HMC loans for presentation to the New York line banks. This analysis indicated that if HBI were forced to liquidate HMC's loan portfolio as of that time, out of a total of $71,000,000 in loans outstanding, HMC's projected losses were $46,000,000. If the New York banks would grant a five-year work out period, Holliday estimated that the losses could be reduced to

$14,000,000 being effected (Ex. #130). As testified to by Holliday, at this point in time he did not know what to report to the SEC, so that he reported nothing for fear of causing a run on HNB.

(22) In 1974 HBI, through one of its directors, acquired indirect control over the Georgia Savings Bank in Atlanta, Georgia. The name of the Georgia bank was then changed to Hamilton Bank & Trust Company (HBTC). In the latter part of 1974, and subsequent to the Comptroller's critical report of September 30, 1974, HBI negotiated an agreement with HBTC whereby HBTC would purchase participation loans from HMC. It was further a part of the agreement that HBI would cause its affiliated banks to purchase certificates of deposit from HBTC in amounts equal to the total participation purchased by HBTC and that HBI would agree to repurchase all participations purchased

by HBTC upon demand. In negotiating this transaction neither Holliday nor Chepul, who participated in the negotiations, disclosed to HBTC the grave financial problems of HBI, including the large volume of classified loans in the HMC portfolio and including the fact that HNB was forbidden to purchase such participations by its December 1974 agreement with the Comptroller. When the Georgia Commissioner of Banking learned of HBTC's acquisition of participations in HMC loans, he ordered HBTC to divest itself of the participations. Upon demand by HBTC, HBI then repurchased the loans. Thereupon the C of D funds deposited in HBTC by HBI affiliates were withdrawn. HBI failed to disclose in its reports filed with the SEC the existence of its buy-back agreement with HBTC, which buy-back agreement had the effect of rendering HBI's December 31, 1974 balance sheet misleading.

(23) Chepul drafted and Holliday reviewed

all of the documents filed with the SEC from 1972 until HBI filed its bankruptcy petition in February of 1976. Chepul also drafted and Holliday reviewed the footnote to the financial statements that were attached to the reports filed with the SEC. Chepul participated in the preparation of the Proxy solicitation materials included in the annual notice of stockholders' meetings during the period from 1972 thru 1975, the last such report issued before bankruptcy having been issued under date of May 14, 1975 (Ex. #62). Holliday reviewed the proxy statements prior to their issuance. At the time of the May 14, 1975 proxy statement none of the adverse matters described in paragraphs (12) thru (20) above was disclosed.

Conclusions of Law

(24) The Court has subject matter jurisdiction over this lawsuit pursuant to Section 22 of the Securities Act [15 USC §77(v)] and

Section 27 of the Exchange Act [15 USC §76aa]. The Court has personal jurisdiction over the parties and venue is proper in the Eastern District of Tennessee.

(25) Pursuant to Section 20 of the Securities Act [15 USC §77t] and Section 21 of the Exchange Act [15 USC §78u], the SEC is empowered to seek and the Court is empowered to issue writs of mandamus and injunctions commanding persons to comply with the Securities and Exchange Acts as well as the rules and regulations promulgated thereunder.

> (26) Section 17(a) of the Securities Act provides:
>
> "It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly--
>
> "(1) to employ any device, scheme, or artifice to defraud, or
>
> "(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material

fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

"(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

(27) Pursuant to the requirements of Section 17(a) of the Securities Act [15 USC §77 g(a)], HBI made "offers and sales" of securities in interstate commerce on a daily basis during the period from 1973 to 1976. Also during thie period HBI offered and sold its common stock through its Employee Stock Ownership Plan.

(28) As the officers in HBI who were responsible for preparing, reviewing, and filing SEC reports, Holliday and Chepul were each primary participants in the deceptions caused by the nondisclosures indicated by the Court in the above findings of fact. As primary participants, they had sufficient direct contacts with the securities transactions of HBI to be

personally responsible for the Securities Act violations. SEC v. Coffey, 493 F.2d 1304, 1315 (6th Cir. 1974).

(29) As primary participants during this period, Holliday and Chepul failed to disclose material matters that would constitute the kind of information to which there is a substantial likelihood a reasonable investor would attach significance in making his investment decisions. SEC v. Mize, 615 F.2d 1046, 1051 (5th Cir. 1980), TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 48 L.Ed.2d 757 (1976).

(30) In this regard it is to be noted that proof of violation of Section 17(a)(2) § (3) of the Securities Act does not require scienter. Aaron v. SEC, 446 U.S. 680, 64 L. Ed.2d 611 (1980). The Court is of the opinion that the defendants violated Section 17(a)(2) § (3) of the Securities Act by failing to disclose material facts as set forth in the Court's

findings of fact. The omission of material facts by the defendants enabled HBI to obtain money for its securities in a manner which operated as a fraud or deceit upon the purchasers of those securities.

(31) Under Section 17(a)(1) of the Securities Act, scienter is a necessary element of the offense. Aaron v. SEC, 446 U.S. 680, 64 L.Ed.2d 611 (1980). "Device", "scheme", and "artifice" all connote knowing and intentional practices and scienter refers to the intent to deceive, manipulate or defraud. Ernst & Ernst v. Hotchfelder, 425 U.S. 185 (1976).

(32) The Sixth Circuit has held that recklessness is a sufficiently culpable state of mind to fulfil the scienter requirement of §10(b) and Rule 10b-5 [15 USC §78(b) and 17 C.F.R. §240.10b-5] which is also the requirement of §17(a)(1). Such recklessness is defined as "highly unreasonable conduct which is an

extreme departure from the standards of ordinary care. While the danger need not be known, it must at least be so obvious that any reasonable man would have known it." Mansbach v. Prescott, Ball & Turben, 598 F.2d 1017, 1025 (6th Cir. 1979). Neither Aaron nor Hochfelder passed upon whether or not scienter required actual wilfulness or only recklessness, so the Sixth Circuit definition is controlling.

(33) The Court is of the opinion that, while the evidence does not establish an actual intent on the part of either defendant to defraud purchasers of HBI securities, the cumulative effect of the many nondisclosures reflected in the record of this case on the part of each of the defendants is such as to indicate a reckless disregard of the consequences of their action. The Court is further of the opinion that this reckless disregard was so unreasonable in the fact of the obvious

requirements of SEC filings as to constitute a violation on the part of both Holliday and Chepul of Section 17(a)(1).

(34) Section 10(b) of the Exchange Act [15 USC § 78i(b)] provides:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange--
>
> * * *
>
> "(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

(35) Rule 10b-5, 17 C.F.R. §240.10b-5 promulgated under the statute provides:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

"(a) To employ any device, scheme, or artifice to defraud,

"(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

"(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

(36) Scienter is a requirement under Section 10(b) and Rule 10b-5. Aaron v. SEC, 446 U.S. 680, 64 L.Ed.2d 611 (1980). Section 10(b) refers to a "purchase or sale" rather than an "offer or sale" as in Section 17(a) and thus reaches a broader range of activities. Rule 10b-5 is nearly identical to Section 17(a).

(37) The Court is of the opinion that the same facts which constituted violations of Section 17(a) of the Securities Act at paragraphs (26) thru (33) also support the finding of violations of Section 10(b) and Rule 10b-5.

(38) In relevant part Section 13(a) of the Exchange Act [15 USC §78m(a)] provides:

> "(a) Every issuer of a security registered pursuant to section 78l [Section 12 of Exchange Act] of this title shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security--
>
> "(1) such information and documents (and such copies thereof) as the Commission shall require to keep reasonably current the information and documents required to be included in or filed with an application or registration statement filed pursuant to section 78l of this title, except that the Commission may not require the filing of any material contract wholly executed before July 1, 1962.
>
> "(2) such annual reports (and such copies thereof), certified if required by the rules and regulations of the Commission by independent public accountants, and such quarterly reports (and such copies thereof), as the Commission may prescribe. Every issuer of a security registered on a national securities exchange shall also file a duplicate original of such information, documents, and reports with the exchange.

(39) Rule 12b pertains to registration and reporting pursuant to Section 13 and Rule 12b-20 [17 C.F.R. §240.12b-20] states:

"In addition to the information expressly required to be included in a statement or report, there shall be added such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made, not misleading."

(40) Rule 13a-1 [17 C.F.R. §240.13a-1] requires:

"Every issuer having securities registered pursuant to section 12 of the Act shall file an annual report on the appropriate form authorized or prescribed therefor for each fiscal year after the last full fiscal year for which financial statements were filed in its registration statement. Registrants on Form 8-B, §249.308b of this chapter, shall file an annual report for each fiscal year beginning on or after the date as of which the succession occurred. Annual reports shall be filed within the period specified in the appropriate form. At the time of filing the annual report, the registrant other than a person registered under the Public Utility Holding Company Act of 1935 or the Investment Company Act of 1940 shall pay to the Commission a fee of $250, no part of which shall be refunded."

(41) Rule 13a-11 [17 C.F.R. §240.13a-11] requires registrants subject to Rule 13a-1 to file current reports on Form 8-K unless the information required has been previously reported.

(42) Rule 13a-13 [17 C.F.R. §240.13a-13] requires registrants who are required to file annual reports pursuant to section 12 or Form 10K or U5S to file quarterly reports on Form 10-Q for the first three fiscal quarters of each fiscal year of the registrant.

(43) The above Section 13(a) and rules promulgated thereunder required HBI, as an issuer of securities registered pursuant to Section 12 of the Exchange Act, to make periodic reports with the SEC. Such reports should have disclosed material facts relating to HBI's financial condition and methods of doing business, including curtailment of business and corporate control imposed upon it by the New York banks, restrictions imposed upon it under the agreement with the Comptroller of the Currency, and other conditions adversely affecting its financial status.

(44) During the period from January 1, 1974 through February of 1976, HBI failed to properly disclose in its reports to the SEC many material facts as set forth in the above finding of fact. The defendants, Chepul and Holliday, as the responsible officials in HBI, participated in these omissions. The Court concludes that these nondisclosures were material within the meaning of Section 13(a). These nondisclosures were also recklessly made and constituted violations of Section 13(a).

(45) Section 14(a) of the Exchange Act, [15 USC §78n(a)] states:

> "It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit

the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 781 [Section 12 of the Exchange Act] of this title."

(46) Rule 14a [17 C.F.R. §240.14a-9]

states:

"No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

"(b) The fact that a proxy statement, form of proxy or other soliciting material has been filed or examined by the Commission shall not be deemed a finding by the Commission that such material is accurate or complete or not false or misleading, or that the Commission has passed upon the merits of or approved any statement contained therein or any matter to be

acted upon by security holders. No representation contrary to the foregoing shall be made."

(47) The defendants Chepul and Holliday were primarily involved in the preparation and review of proxy material issued from May of 1972 to February, 1976, and had a duty to fully and fairly disclose material facts known to them in proxy materials disseminated to HBI shareholders.

(48) The proxy material sent to HBI shareholders during the above period failed to disclose material facts, set forth in the findings of fact. TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 48 L.Ed.2d 757 (1976).

(49) The defendants Chepul and Holliday, in failing to disclose such material facts, acted in a reckless manner which was unreasonable and in the face of the obvious need to provide shareholders with accurate information in proxy solicitation material.

(50) Though it is unclear whether scienter is always required to constitute a violation of Section 14(a), Ash v. LFE Corp., 525 F.2d 215 (3rd Cir. 1975), the recklessness definition for scienter adopted by the Sixth Circuit is certainly adequate to support a violation of Section 14(a) by a corporate officer responsible for the preparation of the proxy material. Gerstle v. Gamble-Skogmo, Inc., 478 F.2d 1281, 1298 (2nd Cir. 1973); Adams v. Standard Knitting Mills, Inc., 623 F.2d 422, 428 (6th Cir. 1980).

The Court concludes that the defendants Chepul and Holliday violated Section 14(a).

(51) In determining whether to grant an injunction pursuant to Section 20 of the Securities Act [15 USC §77t] and Section 21 of the Exchange Act [15 USC §78u] the following factors are appropriate for consideration:

> " . . . the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction,

the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations." SEC v. Blatt, 583 F.2d 1325 (5th Cir. 1978).

(52) In considering the above factors, the Court is of the opinion that the evidence does not establish any likelihood that defendant Holliday will commit or have opportunities to commit future violations of these Securities laws in his position with C & C Capital Corporation and no order enjoining such future violations will be entered against him.

(53) The Court is further of the opinion that defendant Chepul's job with United Carolina Bancshares presents him with substantially the same opportunities to violate the Securities laws as he experienced with HBI. As the Court has determined that the defendants committed numerous violations of the Securities

laws with a reckless disregard for the consequences of thier actions, defendant Chepul will be enjoined from future violations of those laws.

A judgment will enter in accordance with these findings and conclusions.

/S/ Frank W. Wilson

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE,
SOUTHERN DIVISION

SECURITIES & EXCHANGE COMMISSION	]	
- vs. -	]	CIV-1-79-216
THOMAS WENDELL HOLLIDAY and RICHARD A. CHEPUL	]	Filed November 22, 1982

AMENDED FINAL JUDGMENT

This is an action by the Securities & Exchange Commission against certain former directors and officers of Hamilton Bancshares, Inc., in which the Securities & Exchange Commission seeks a permanent injunction restraining and enjoining the defendants from committing future violations of the Securities Act of 1933, 15 USC §§ 77a et seq. or of the Securities Exchange Act of 1934, 15 USC §§ 78a et seq. Jurisdiction is invoked pursuant to 15 USC § 775(b) and 15 USC § 78u(d) and (e) and is not

in dispute. Prior to the trial of the case a consent decree was entered as to the defendants, N. Rountree Youmans and John Vorder Bruegge. The case having been tried before the Court sitting without a jury as to the defendants, Thomas Wendell Holliday and Richard A. Chepul, and the Court having entered Findings of Fact and Conclusions of Law, this judgment is entered in accordance therewith.

It is accordingly ORDERED and ADJUDGED that this lawsuit be and the same is hereby dismissed as to the defendant, Thomas Wendell Holliday.

It is further ORDERED and ADJUDGED that the defendant, Richard A. Chepul, be and he hereby is permanently enjoined from directly or indirectly violating the following sections of the Securities Act of 1933 and/or the Securities Exchange Act of 1934, or rules or regulations issued thereunder:

(1) Section 17(a)(1)(2) and (3)[1] of the Securities Act of 1933 [15 USC § 77g(a)(1)(2) and (3)];

(2) Section 10b[2] of the Exchange Act of 1934 [15 USC § 78i(b)] and Rule 10b-5[3] [17 C.F.R. 240.10(b)-5] promulgated under Section 10b of the Exchange Act of 1934;

(3) Section 13a[4] of the Securities Act of 1934 [15 USC § 78m(a)] and Rules 12(b)-20[5], 13(a)-1[6], 13(a)-11[7] and 13(a)-13[8] [17 C.F.R. 240.12b-20, 240.13a-1, 240.13a-11 and 240.13-13] promulgated under Section 13a of the Securities Act of 1934; and

(4) Section 14a[9] of the Exchange Act of 1934 [15 USC § 78n(a)] and Rule 14(c)-8[10] [17 C.F.R. 240.14a-9] promulgated under Section 14a of the Exchange Act of 1934.

The Court shall retain jurisdiction of this action to make such further orders as may be appropriate or necessary to insure

compliance with the terms of this Final Judgment.

APPROVED FOR ENTRY.

/S/ Robert L. Vining, Jr.

(Footnotes Omitted)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

SECURITIES AND EXCHANGE COMMISSION,	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
NEAL ROUNTREE YOUMANS, JOHN VORDERBRUEGGE, THOMAS WENDELL HOLLIDAY, and RICHARD A. CHEPUL,	:	CIV-1-79-216 Filed January 24, 1983
	:	
Defendants.	:	

NOTICE OF APPEAL

Notice is hereby given that the Securities and Exchange Commission, the plaintiff in the above-entitled action, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the Amended Final Judgment of this Court entered in this action on November 22, 1982.

Dated: January 19, 1983

/S/ Barton S. Sacher

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and Exchange Commission
Atlanta Regional Office
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No. 83-5054

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SECURITIES AND EXCHANGE COMMISSION, Plaintiff-Appellant,	)	
v.	)	ORDER
NEAL ROUNTREE YOUMANS, JOHN VORDER-BRUEGGE, THOMAS WENDELL HOLLIDAY; and RICHARD CHEPUL, Defendants-Appellees.	)	(Filed June 9, 1983)

BEFORE: KEITH, KENNEDY and JONES, Circuit Judges.

This matter is before the Court upon consideration of the motions to dismiss appeal no. 83-5054 as being filed outside the time period prescribed by Fed. R. App. P. 4(a). The SEC has responded thereto.

The record shows that the final judgment was entered on November 22, 1982. Chepul

filed a timely notice of appeal on January 17, 1983, which was docketed in this Court as case no. 83-5038. Fed. R. App. P. 4(a)(1). Fed. R. App. P. 4(a)(3) provides that "any other party may file a notice of appeal" within 14 days after the first timely appeal is filed or within the time otherwise prescribed by Rule 4(a), whichever last expires. The SEC's notice of appeal, docketed as case no. 83-5054, was filed seven days after Chepul's timely appeal. The notice of appeal of the SEC was filed within the time provisions of Fed. R. App. P. 4(a)(3), and is timely. Kurdziel v. Pittsburgh Tube Company, 416 F.2d 882 (6th Cir. 1969).

It is ORDERED that the motions to dismiss be and hereby are denied.

ENTERED BY ORDER OF THE COURT

/S/ John P. Hehman

NO. 83-5054
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,	]	
Plaintiff-Appellant,	]	ON APPEAL from the United States District Court for the Eastern District of Tennessee.
v.	]	
NEAL ROUNTREE YOUMANS, et al.,	]	
Defendants,	]	
THOMAS WENDELL HOLLIDAY,	]	
Defendant-Appellee.	]	

Decided and Filed March 8, 1984

Before: ENGEL and CONTIE, Circuit Judges; and PECK, Senior Circuit Judge.

CONTIE, Circuit Judge. The Securities and Exchange Commission (SEC) appeals from a district court order which declined to enjoin

Holliday, the defendant, from violating certain provisions of the securities laws. Although the district court found that both Holliday and a co-defendant, Chepul, had violated section 17(a)(1)(2) and (3) of the Securities Act of 1983 and sections 10(b), 13(a) and 14(a) of the Securities Exchange Act of 1934, the court refused to impose an injunction against Holliday under either section 20 of the Securities Act or section 21 of the Securities Exchange Act. The court did enjoin Chepul from violating the securities laws in the future. We reverse the district court's decision not to impose injunctive relief against Holliday.

The district court opinion contains an excellent recitation of facts that will not be repeated here. This case essentially involves events transpiring prior to the bankruptcy of Hamilton Bancshares, Inc. (HBI), a bank holding company, and the failure of Hamilton

National Bank (HNB), HBI's largest asset. It will suffice to say that the district court found that both Holliday and Chepul had responsibility in their respective jobs with HBI for filing reports required by the SEC. Both committed, with scienter, numerous and serious violations of the securities laws over a four-year period.

Before moving to the merits, two preliminary points must be considered. First, Holliday contends that the SEC's notice of appeal was untimely filed. Since another panel of this court has ruled that the SEC filed its appeal in timely fashion, this claim must be rejected under the law of the case doctrine. Second, Holliday argues that the district court improperly concluded that he violated the securities laws. He has not, however, cross-appealed on this point. Since filing a notice of cross-appeal is jurisdictional where an appellee

wishes to attack part of a final judgment in order to enlarge his rights or to reduce those of his adversary, see Morley Construction Co. v. Maryland Casualty Co., 300 U.S. 185 (1937); Ford Motor Credit Co. v. Aetna Casualty & Surety Co., 717 F.2d 959, 962 (6th Cir. 1983), this court will not consider Holliday's arguments concerning the findings of securities laws violations. The only issue properly before this court is whether the district court erred in declining to impose injunctive relief against Holliday.

The district court's decision is reviewable under an abuse of discretion standard. Securities and Exchange Commission v. Bonastia, 614 F.2d 908, 913 (3d Cir. 1980); Securities and Exchange Commission v. Blatt, 583 F.2d 1325, 1334-35 (5th Cir. 1978). In applying this standard, we note that injunctions based upon the securities laws are primarily intended

to protect the investing public from future misconduct. See, e.g., Bonastia, 614 F.2d at 912. Since the basis for such injunctions is statutory rather than equitable, "the standards of the public interest not the requirements of private litigation measure the propriety and need for injunctive relief." Securities and Exchange Commission v. Management Dynamics, Inc., 515 F.2d 801, 808 (2d Cir. 1975). Thus, proof of irreparable harm and inadequacy of legal remedies need not be shown. Id.

The test that the district court was required to apply was whether the SEC had shown a reasonable and substantial liklihood that Holliday, if not enjoined, would violate the securities laws in the future. See Securities and Exchange Commission v. Washington County Utility District, 676 F.2d 218, 227 (6th Cir. 1982); Bonastia, 614 F.2d at 912;

Blatt, 583 F.2d at 1334; Management Dynamics, 515 F.2d at 808. The following factors are relevant in determining the liklihood of future violations:

1. the egregiousness of the violations,
2. the isolated or repeated nature of the violations,
3. the degree of scienter involved,
4. the sincerity of the defendant's assurances, if any, against future violations,
5. the defendant's recognition of the wrongful nature of his conduct,
6. the liklihood that the defendant's occupation will present opportunities (or lack thereof) for future violations, and
7. the defendant's age and health.

See Washington County Utility District, 676 F.2d at 227 & n.19; Blatt, 583 F.2d at 1334 n.29. The courts have taken care to stress that no one factor is determinative, see, e.g., Washington County Utility District, 676 F.2d at 227 n.19, and the change of occupation, without

more, will not provide a complete defense to the issuance of an injunction. See Bonastia, 614 F.2d at 913; Securities and Exchange Commission v. Koracorp Industries, Inc., 575 F.2d 692, 698 (9th Cir.), cert. denied, 439 U.S. 953 (1978). Since a person who has violated the securities laws may change jobs at any time, the latter proposition of law clearly is correct.

We hold that the district court abused its discretion by focusing exclusively on the change of occupation factor. The record establishes that both Holliday and Chepul engaged, with scienter, in serious and repeated violations of the securities laws over a four-year period. Although Chepul was enjoined, Holliday was not. The only difference between the situations of the co-defendants cited by the district court was that Chepul presently is employed in a position which requires him to file reports

with the SEC whereas Holliday currently is not so employed. Although the district court purported to apply the correct legal standard, it in fact erroneously treated Holliday's change of occupation as controlling the question of whether the latter would transgress the securities laws in the future. As has been indicated, change of occupation alone is no defense to the issuance of an injunction in this type of case.

The district court's judgment on the relief issue is REVERSED and the case is REMANDED with instructions to enter an appropriate injunction against Holliday.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

NO. 83-5054

SECURITIES AND EXCHANGE COMMISSION, Plaintiff-Appellant,	)	
vs.	)	
NEAL ROUNTREE YOUMANS, et al, Defendants,	)	Filed March 8, 1984
THOMAS WENDELL HOLLIDAY, Defendant-Appellee.	)	

Before: ENGEL and CONTIE, Circuit Judges; and PECK, Senior Circuit Judge.

J U D G M E N T

ON APPEAL from the United States District Court for the Eastern District of Tennessee.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby reversed and the case is remanded with instructions to enter an appropriate injunction against Holliday.

It is further ordered that Plaintiff-Appellant recover from Defendant-Appellee the costs on appeal, as itemized below, and that execution therefor issue out of said District Court, if necessary.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

/S/ John P. Hehman

NO. 83-5054

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

SECURITIES AND EXCHANGE COMMISSION Plaintiff-Appellee vs. NEAL ROUNTREE YOUMANS, et al. THOMAS WENDELL HOLLIDAY Defendant-Appellee	)	<u>O R D E R</u> Filed April 27, 1984

Before: ENGEL and CONTIE, Circuit Judges; and PECK, Senior Circuit Judge.

A majority of the court having not voted in favor of an _en banc_ rehearing, the petition for rehearing filed by the appellee has been referred to the hearing panel for disposition.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

ENTERED BY ORDER OF THE COURT

/S/ John P. Hehman

(2)

No. 84-140

In the Supreme Court of the United States

OCTOBER TERM, 1984

THOMAS WENDELL HOLLIDAY, PETITIONER
v.
SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an appeal by the government is timely within the provisions of Rule 4(a)(3) of the Federal Rules of Appellate Procedure, where the government's notice of appeal is filed within fourteen days after a notice of appeal was filed by an adverse party.

2. Whether a defendant in a government enforcement action who does not himself appeal may attack the judgment below with a view to enlarging his own rights and reducing those of the government by challenging the district court's conclusion that he had violated the law.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-140

THOMAS WENDELL HOLLIDAY, PETITIONER

v.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A45-A52) is reported at 729 F.2d 413. The opinion of the district court (Pet. App. A1-A36) is reported at 543 F. Supp. 1292.

JURISDICTION

The judgment of the court of appeals (Pet. App. A53-A54) was entered on March 8, 1984. A petition for rehearing was denied on April 27, 1984 (Pet. App. A55-A56). The petition for a writ of certiorari was filed on July 26, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Securities and Exchange Commission instituted this action against petitioner Thomas Wendell Holliday and Richard A. Chepul, two former officers of Hamilton

Bancshares, Inc. (HBI), to obtain a declaration that they violated, and to enjoin them from committing further violations of, the Securities Act of 1933, 15 U.S.C. 77a *et seq.*, and the Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.* (Pet. App. A1-A2, A4-A5; C.A. App. 23).[1] The Commission alleged that, in HBI's required filings, the defendants had concealed from HBI's shareholders and the investing public material information concerning HBI's deteriorating financial condition during the period preceding its bankruptcy (Pet. App. A7; C.A. App. 15-23).

Following an eight-day trial, the United States District Court for the Eastern District of Tennessee found that both defendants had been "primary participants" in "numerous" violations of antifraud,[2] reporting,[3] and proxy[4] provisions of the federal securities laws and that both had acted with reckless disregard for the consequences of their actions despite the "obvious" requirements of the securities laws and the need to provide shareholders with accurate information concerning the financial condition of HBI (Pet. App. A22-A27, A31, A33-A34).[5] The court entered an

[1]Petitioner was the executive vice president and later president of HBI as well as a member of its board of directors (Pet. App. A4). Chepul was the company's vice president, secretary-treasury and chief financial officer (*id.* at A5). Chepul was supervised by petitioner, and together they were responsible for preparing, reviewing and filing HBI's reports required under the Securities Exchange Act (Pet. App. A4-A6).

[2]Section 17(a) of the Securities Act, 15 U.S.C. 77q(a), and Section 10(b) of the Securities Exchange Act, 15 U.S.C. 78j(b), and Rule 10b-5, 17 C.F.R. 240.10b-5, thereunder.

[3]Section 13(a) of the Securities Exchange Act, 15 U.S.C. 78m(a), and Rules 12b-20, 13a-1, 13a-11 and 13a-13, 17 C.F.R. 240.12b-20, 240.13a-1, 240.13a-11, and 240.13a-13, thereunder.

[4]Section 14(a) of the Securities Exchange Act, 15 U.S.C. 78n(a), and Rule 14a-9, 17 C.F.R. 240.14a-9, thereunder.

[5]The court noted (Pet. App. A7) that the failure of HBI's largest subsidiary, Hamilton National Bank, was the "third largest bank failure in the history of the Nation" up to that time.

injunction against Chepul but declined to enjoin petitioner solely because, at the time of trial, petitioner was employed by a firm that did not file reports under the securities laws (*id.* at A34-A35; see *id.* at A5). An amended final judgment enjoining Chepul and dismissing the action against petitioner was entered on November 22, 1982 (*id.* at A37).

2. On January 17, 1983 — four days before the expiration of the 60-day period prescribed by Rule 4(a)(1), Fed. R. App. P. — Chepul filed a timely notice of appeal from the amended final judgment (Pet. 4). Seven days later, on January 24, 1983, the Commission also filed a notice of appeal from the amended final judgment (Pet. App. A41). Chepul subsequently settled with the Commission and his appeal was dismissed by stipulation (Pet. 5).

Petitioner moved to dismiss the Commission's appeal. He contended that since the Commission's notice of appeal had not been filed within 60 days after entry of the amended final judgment, it was not timely under Rule 4(a)(1). The court of appeals denied petitioner's motion (Pet. App. A43-A44), concluding that the Commission's notice was timely because it had been filed within 14 days after Chepul's notice, as provided by Rule 4(a)(3).[6]

In its opening brief on the merits, the Commission argued that the district court had erred in declining to enjoin petitioner solely because of his change of employment. In response, petitioner argued that the district court had correctly denied injunctive relief. The principal thrust of his brief, however, was that the district court had erred in

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[6]Rule 4(a)(3), Fed. R. App. P., provides:

> If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.

finding that petitioner had violated the federal securities laws, and he sought to have that aspect of the district court's decision reversed.

In light of petitioner's failure to file a notice of appeal, the court of appeals declined to consider his challenge to the district court's finding of violation (Pet. App. A47). The court stated that a notice of appeal is jurisdictional "where an appellee wishes to attack part of a final judgment in order to enlarge his rights or to reduce those of his adversary" (*id.* at A47-A48). In addition, the court of appeals reversed the district court's denial of an injunction against petitioner, concluding that the district court had erred in treating petitioner's change of occupation as controlling the question of injunctive relief (*id.* at A53-A54). The case was remanded with instructions for the district court to enter an appropriate injunction against petitioner (*id.* at A52, A54).

ARGUMENT

The judgment of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review by this Court is therefore unwarranted.

1. The court of appeals correctly held that the Commission's notice of appeal was timely within the provisions of Rule 4(a)(3), Fed. R. App. P. Although the Commission's notice was filed more than 60 days after the entry of judgment by the district court, it was timely nevertheless because it was filed within 14 days after a notice of appeal was filed by Chepul, petitioner's co-defendant. Petitioner claims (Pet. 12-14), however, that because he was not "a party to the portion of the Amended Final Judgment" from which Chepul had appealed, therefore the Commission could not take advantage of the 14-day period. The contention is without merit.

Rule 4(a)(3) has no such limitation. It provides that "[i]f a timely notice of appeal is filed *by a party, any other party*" (emphasis added) may have an additional 14 days in which to file a notice of appeal. The notes of the committee that recommended the adoption of the 1966 amendment allowing the additional 14 day period state (9 Moore, Ward & Lucas, *Moore's, Federal Practice* para. 203.25[3], at 3-106 (2d ed. 1983); emphasis added)[6] that it

> affords additional time for appeal to *all parties* other than an initial appellant * * *. The added time which may be made available by the operation of the provision is not restricted to cross appeals in the technical sense, i.e., to appeals by parties made appellees by the nature of the initial appeal. The exception permits *any party to the action* who is entitled to appeal within the time ordinarily prescribed to appeal within such added time as the sentence affords.

The Commission, petitioner and Chepul were all parties to the same civil case;[7] and, thus, by the clear terms of Rule 4(a)(3), the Commission was entitled to appeal from the judgment within the 14 day period following the filing of Chepul's notice of appeal.

Petitioner has cited no authority for limiting the rule as he suggests. *Kurdziel* v. *Pittsburgh Tube Co.*, 416 F.2d 882

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[6]The fourteen-day grace period was added in 1966 to Rule 73(a) of the Federal Rules of Civil Procedure. Rule 4(a) of the Federal Rules of Appellate Procedure, which became effective on July 1, 1968, was derived from that rule without any change of substance. The committee notes to the former rule continue to be a useful guide to Rule 4(a), providing a detailed explanation of the reasons for and effect of various of the provisions of Rule 4(a). See Fed. R. App. P. 4 advisory committee note; 9 Moore, Ward & Lucas, *supra*, para. 201.08[3], at 1-23.

[7]In the context of Rule 4(a), it is clear that "party" refers to a party to a "civil case" (see Rule 4(a)(1)), rather than to a party to a judgment or portion of a judgment.

(6th Cir. 1969), on which he relies (Pet. 11-12), states " 'that the purpose of the rule * * * was clearly to give subsidiary parties, such as third-party defendant[s] * * * an opportunity to know whether or not an appeal was going to be taken in the principal case before they were required to make their judgment as to whether or not to appeal,' " but *Kurdziel* does not limit the application of the rule to such "subsidiary" parties. 416 F.2d at 885. Indeed, the opinion quotes the committee notes that explicitly state that the rule permits " 'any party to the action' " to appeal within the added time. 416 F.2d at 884-885.[8]

2. With respect to the court of appeals' refusal to consider petitioner's challenge to the district court's determination that he violated the securities laws, the issue presented in the petition is a narrow one. Petitioner does not dispute the "inveterate and certain" rule of *Morley Construction Co.* v. *Maryland Casualty Co.*, 300 U.S. 185, 191 (1937), that an appellee who does not himself appeal may not

> attack the decree [of the district court] with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below.[9]

[8]The court of appeals' holding provides the same meaning to the term "any other party" in Rule 4(a)(3) as the terms "any party" and "all parties" convey in Rule 4(a)(4), Fed. R. App. P. Rule 4(a)(4) states that the filing "by any party" of certain specified motions in the district court tolls the time for appeal "for all parties" until the motion is decided. See 9 Moore, Ward & Lucas, *supra,* para. 203.25[3], at 3-107. It is of no consequence that the post-judgment motion was directed against only certain parties; it has "the effect of terminating the running of the time for appeal against all the [parties]." *Polara* v. *Trans World Airlines, Inc.*, 284 F.2d 34, 36 (2d Cir. 1960).

[9]This rule has been applied in numerous cases by this Court and the courts of appeals. *E.g., United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 226 n.2 (1975) (review by Supreme Court in absence of

Indeed, petitioner appears to concede that he could not "attempt to increase his right under the judgment or decrease the SEC's right" (Pet. 16). He argues instead that a reversal of the district court's conclusion that he violated the securities laws would not have enlarged his rights. So viewed, petitioner's submission does not call for this Court's intervention since he is merely quarrelling with the court of appeals' application of a universally accepted legal principle to the facts of this case.

In any event, the decision of the court of appeals was correct, since petitioner was plainly seeking to enlarge his rights and reduce those of the government. A finding in a government enforcement action that a defendant violated the law has significance independent of the ultimate decision to deny injunctive relief. Indeed, this Court has held that the government is entitled to a finding on the issue of a violation even though injunctive relief is denied. *United States* v. *Parke, Davis & Co.*, 365 U.S. 125, 126 (1961).[10] The instant case well illustrates the importance of that holding. The district court here refused to enjoin petitioner solely because it concluded that his present employment makes it unlikely that he will be in a position to violate the securities laws. Even if the Commission had not prevailed on appeal, it could still return to the district court in the future and request that the judgment be amended and petitioner enjoined should he change his employment once

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cross-petition for a writ of certiorari); *Strunk* v. *United States*, 412 U.S. 434, 437 (1973); *NLRB* v. *International Van Lines*, 409 U.S. 48, 52 n.4 (1972); *Penfield Co.* v. *SEC*, 330 U.S. 585, 594 (1947); *LeTulle* v. *Scofield*, 308 U.S. 415, 421-422 (1940); *United States* v. *American Ry. Express Co.*, 265 U.S. 425, 435-436 (1924); *SEC* v. *Fifth Avenue Coach Lines, Inc.*, 435 F.2d 510, 516 (2d Cir. 1970).

[10]As in *Parke, Davis*, the complaint in this case specifically requested, in the prayer for relief, a declaration that the defendants had violated the law (C.A. App. 23).

again. That possibility for relief would not have been open to the Commission had the court of appeals reversed the district court's finding of violation.

In addition, if petitioner should violate the securities laws in the future, the fact that the district court found violations in this case — regardless of whether the court of appeals had ordered an injunction — would be an important factor demonstrating the need for injunctive relief in any action brought by the Commission to redress such future violations.[11]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[11] We also note that findings of violation in Commission enforcement actions may have collateral estoppel effect in private actions brought under the securities laws. *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 332-333 (1979).